States a federal court thus having original or removal jurisdiction thereof also has power, and is authorized, to determine all questions in the case, local as well as Federal. Siler v. Louisville & N. R. Co., 213 U.S. 175 (1909).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

United States Constitution amendment v: ". . . nor be deprived of life, liberty, or property, without due process of law; . . ."

United States Constitution amendment vi:" . . by an impartial jury of the state. . ."

United States Constitution amendment vii: "Trial by jury and in civil cases. In suits, common law, ...the right of trial by jury shall be preserved . . ."

United States Constitution amendment xiv: "...nor shall any state deprive any person life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

WASHINGTON STATE CONSTITUTION

Washington State Constitution amendment: article i, sect. 3: "personal rights. No person shall be deprived of life, liberty or property, without due process of law . . ."

Washington State Constitution amendment: article i, sect. 21: "Trial by jury. The right of trial shall remain inviolate..."

WASHINGTON STATE STATUTES

Wash.Rev.Code § 4.44.170 (1975) Particular Causes of challenge. Particular causes of challenge are of three kinds: (1) For such a bias as when the existence of the facts is ascertained, in judgment of law disqualifies the juror, and which is known in this codes as implied bias.

Wash.Rev.Code § 4.44.180(4)(1881) Implied bias defined. A challenge for implied bias may be taken for any or all of the following causes, and not be otherwise:

(1) Consanguinity or affinity within the fourth degree to either party.

...(4) Interest on the part of the juror in the event of the action, or the principal question involved therein, excepting

always, the interest of the juror as a member or citizen of the county or municipal corporation.

STATEMENT OF THE CASE

Petitioner James Allison was involved in an auto accident. His insurance company, State Farm Mutual Automobile Insurance Company (hereinafter State Farm), guessed that it was intentional, wanted to call the incident road rage between the drivers, and denied him coverage. He sued State Farm for coverage. State Farm brought a summary judgment motion and the district court denied coverage. The superior court reversed. At trial, four of the six-person jury selected (5 needed for decision) were current State Farm Mutual Auto Insurance insureds and the judge allowed them to stay on the jury despite strenuous objection and motions by Petitioner's counsel before the actual trial began. State Farm Mutual Automobile Insurance Company is a mutual insurance company, which by definition, means that its insureds are owners of the company and it is undisputed that most auto insureds pay for their own insurance versus payment by third parties. At trial, the jury agreed that State Farm breached its contract and had to provide coverage for a portion of his losses. This outcome was patently foreseeable given that the majority of the jurors

were asked to pass judgement on their own insurance company and award damages against a company they own and benefit from loss reduction. Allisons appealed, seeking a new trial. The superior court summarily denied the appeal and the appeals court and Washington Supreme Court denied review. This case started as a state district court case below Washington's general jurisdiction court, superior court, and such cases only have a right of appeal to superior court and only discretionary review thereafter. The matter was remanded back to Seattle District Court to determine fees and costs to prevailing Allisons. That court denied any fees to Mr. Allison or his separate party spouse, Mrs. Allison, who was not even there during the auto accident. The judge making this decision was not the trial judge and evidently thought that a jury award to the prevailing Allisons of coverage, breach of contract by State Farm, and an award of damages still precluded the Allisons from receiving any fees under some unexpressed theory that because a portion of the Allison claim was not granted, the Allisons are not entitled to equity for fees because Mr. Allison allegedly must have been misrepresenting about the other portion of the incident damage not awarded. This was appealed to superior court, who again summarily denied the appeal and reconsideration. The court of appeals and the Washington Supreme Court

denied review. Petitioner seeks review herein of these significant issues of fair juries, jury thinking on misrepresentation without ever being asked to make such a finding, and fees to a separate party spouse. The above described decisions under review are attached in the Appendix.

REASONS FOR GRANTING THE PETITION

The Court should grant writ of certiorari here because there are no United States Supreme Court cases on point and the Court should clarify that the Constitution requires that:

1. The right to impartial juries should be inviolate and jurors who are policyholders of a defendant mutual insurance company are per se disqualified for challenge This issue affects hundreds of millions of insureds who potentially face their own insurance companies in court.

2. Award of only part of an insurance claim does not necessarily, without more facts and certainly not as a matter of law, mean misrepresentation of the denied portions of the claim. This issue affects many hundreds of millions of insureds' claims for coverage and fees, both of which could be denied by partial denial of claims.

3. That spouses and other separately insureds are separate parties in a law suit and are entitled to their own due process and equal protection rights in all matters, including attorneys

fees and costs. This issue affects hundreds of millions of insureds who potentially face their insurance companies in court.

PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED BECAUSE THE JURY SEATED WAS BIASED PER SE BY HOLDING POLICIES OF OWNERSHIP IN DEFENDANT MUTUAL INSURANCE COMPANY.

As the court in Wallace v. Swift Spinning Mills Inc., 236 Ga.App. 613, 511 S.E.2d 904 (Ga.App. 1999): stated at n.2:

> A mutual insurance company is one that does not issue capital stock, so that "the policy-holder has an interest in the assets of the company, usually realized by the way of dividends reducing the policy premium[.]" Weatherbee v. Hutcheson, supra at 76. See also Patterson v. Lauderback, 211 Ga.App. 891, 895(3), 440 S.E.2d 63 (1994), overruled on other grounds, Warren v. Ballard, 266 Ga. 408, 410 ,467 S.E.2d 891 (1996): Black's Law Dictionary, 6th ed., p. 1021. However, these policy-holders also may be liable for any judgment against the insurance company. Patterson v. Lauderback, supra.

The Wallace, supra, court held that jury panelists with relationship to insurance company that has demonstrable, direct financial interest as insurer in case, such as employees, officers, stockholders, policy-holders of mutual insurance companies, or family members of someone in those prohibited categories, may not be impartial, and should be removed from panel for cause. Wallace v. Swift Spinning Mills, Inc., 236 Ga. App. 613, 511 S.E.2d 904 (1999).

Courts in the vast majority of cases have taken the position that juror policyholders of mutual insurance companies are subject to challenge for cause, based on having a direct pecuniary interest in litigation in which the insurer has an interest in the outcome. For example, see state cases:

Hudson v. Stripling, 261 Ala. 196, 73 So. 2d 514 (1954); Bailey v. Todd, 126 Ga. App. 731, 191 S.E.2d 547, cert. den. 409 U.S. 1113 (1972); Strickland v. Winterville, 130 Ga. App. 425, 203 S.E.2d 706 (1973); Weatherbee v. Hutcheson, 114 Ga. App. 761, 152 S.E.2d 715 (1966); Moore v. Bezalla, 241 N.C. 190, 84 S.E.2d 817 (1954); McCollum v. Shubert, 185 S.W.2d 48 (Mo. App. 1944).

Also for example, see federal cases:

In Getter v. Wal-Mart Stores Inc., 66 F.3d 1119 (10th Cir. 1995) the court stated:

> In our recent Vasey [Vasey v. Martin Marietta Corp., 29 F.3d 1460, 1467 (10th Cir. 1994)] decision, we noted that "courts have presumed bias in extraordinary situations where a prospective juror has had a direct financial interest in the trial's outcome." Id. at 1468. As examples of such extraordinary situations, we cited a case in which a prospective juror was a stockholder in or an employee of a corporation that was a party to the suit Id. (citing Gladhill v. General Motors Corp., 743 F.2d 1049 (4th Cir. 1984): Francone v. Southern Pac. Co., 145 F.2d 732 (5th Cir. 1944)). "In these situations, the relationship between the prospective juror and a party to the lawsuit 'point[s] so sharply to bias in [the] particular juror' that even the juror's own assertions of impartiality must be discounted in ruling on a challenge for cause." Id. (quoting United States v. Nell, 526 F.2d 1223, 1229 n.8 (5th Cir. 1976))....Gladhill, 743 F.2d at 1050("'That a stockholder in a company which is [a] party to a lawsuit is incompetent to sit as a juror is so well settled as to be black letter law.'") (quoting Chestnut v. Ford Motor Co., 445 F.2d 967, 971 (4th Cir. 1971)).

The United States Supreme Court has denied certiorari letting stand a case making a distinction between jurors per se stricken for being mutual insurance company policyholders and those not automatically stricken for being

just policyholders in stock insurance companies. See Bailey v. Todd, 126 Ga. App. 731, 191 S.E.2d 547, cert. den. 409 U.S. 1113(1972).

In the instant case the trial court denied challenges for cause for the four State Farm insureds contrary to Petitioner's United States Constitution due process rights to an impartial jury (see herein at 4). [This ruling also violated his Washington constitutional rights to an impartial jury (see herein at 4) and statutes requiring the same (see herein at 5)]. At voir dire, the court denied the challenge for cause, stating that being policyholders in defendant mutual insurance company was not enough alone without other grounds of bias. Appendix A at v. The jury selection portion of challenges was not recorded (Appendix A at iv), but petitioner's counsel strenuously argued that mutual insurance policyholders can not possibly decide a case against their named defendant insurance company. Petitioner's counsel was faced with a mandatory only 20 minutes total of voir dire time to question 16 jurors in less than two minutes each to find all bias grounds (Appendix A at ii). Voir dire ended the first day of trial with Petitioner's counsel using all three of his peremptory challenges on jurors of suspected bias other than policyholders, as he could not strike all or most of the State

Farm policyholders and remove the others of suspected bias to plaintiff and would have been left with State Farm policyholders in any case. All of this rationale and argument was reiterated on the record at the beginning of the next day of trial before the trial began. See all of Appendix B transcript. Petitioners' counsel raised the case of Dean v. Group Health, 62 Wash. App. 829, 816 P.2d 757 (1991) where the court there said that is was a close call to allow Group Health insured jurors to remain on the jury because there was no showing that the jurors paid their own premiums (as employers often pay health insurance), the objecting attorney objected only after jury selection, and the attorney left unused some of his challenges. In the instant case, it would not be a close call at all for the Dean court because the opposite is true of all of these points: here,(1) auto insurance on one's own car is almost never paid for by one's employer or other third party (the Dean court stated in footnote four that even in its case "a direct pecuniary interest can be established if the juror is paying his or her own premiums."), (2)the objection was raised prior to the jury selection, and(3) all of petitioners' counsel's challenges were used. In the instant case, the court erroneously ruled that the challenges were still denied, stating that it was a "close one", but because petitioner's counsel used his peremptory

challenges on other jurors instead of the policyholders, the challenge was denied. Appendix B at xii-xiii. This is error and a violation of Constitutional rights. Other potential jurors were available (Appendix B at ii), but the court erred in seating a biased jury, leading to a great deal of waste of judicial and parties' time and expense.

An erroneous denial of a challenge for cause is reversible error because it forces the litigant to exercise a peremptory challenge. Some circuits consider the loss of a peremptory challenge per se reversible error. See, e.g. United States v. Cambara, 902 F.2d 144, 147 (1st Cir. 1990) (stating that "restricting a defendant's use of the lawful number of peremptory challenges is reversible error if a challenge for cause is erroneously denied"); United States v. Ruuska, 883 F.2d 262, 268 (3rd. Cir. 1989) ("[T]he denial or impairment of the right to peremptory challenges is reversible error per se....[It] cannot be dimissed as harmless.") (citations omitted).

The court in Martins v. Farmers' Mut. Fire Ins. Co., 139 Mich. 148, 102 N.W. 656 (1905), concluded that policyholders of the defendant mutual fire insurance company were incompetent to serve as jurors. The trial court

had overruled plaintiff's objection to the first of five such prospective jurors, which the plaintiff had dismissed by peremptory challenge, and subsequently denied the plaintiff's motion for a new trial on the theory that two of the jurors stated that they were not biased, while two others could have been excused by the plaintiff's remaining peremptory challenges, the trial court reasoning that further objection to the jury, as finally constituted, had been waived. In reversing, the court stated that, once a challenge for cause has been erroneously overruled, counsel need not duplicate his exception in challenging subsequent candidates to the jurors who are disqualified for the same reason, and therefore does not waive objection to the ultimate constitution of the jury. Noting that error, in order to be reversible, must be accompanied by prejudice to the objecting party, the court concluded that, because the plaintiff's two remaining peremptory challenges were insufficient to exclude the four disqualified jurors, the trial court's action in overruling the motion to excuse the jurors constituted reversible error. Here petitioner only had three peremptories but faced four policyholders and other jurors of suspected bias and used all the peremptories. In Pickering v. Wagnon, 91 Ga. App. 610, 86 S.E.2d 621 (1955), the court held although a panel member had been peremptorily stricken by the plaintiff's

counsel during the selection of the jury, and thus did not serve on the jury, the court stated that the parties to a trial are entitled to an impartial panel from which to strike a jury ,and reasoned that the failure of the interested, related to policyh older juror to disqualify himself had the effect of causing the plaintiff to unnecessarily exhaust her peremptory strikes, depriving her of the right to use the strikes to exclude members of a qualified panel.

Similarly in Andry v. Cumis Ins. Soc., 387 So. 2d 1374 (La. App. 4th Cir. 1980), the court held that it is error to overrule challenges to jurors because they thought their own insurance premiums might rise from a verdict. There a party used three of his peremptory challenges to remove jurors after the court overruled challenges to them. This exhausted all the peremptory challenges prior to completing the impaneling of the jury and therefore was improper.

In Fedorinchik v. Stewart, 289 Mich. 436, 286 N.W. 673 (1939), the court concluded that a trial court had erred by not permitting the plaintiff's counsel to question prospective jurors as to whether they or their spouses owned such policies. The court ruled a court abuses its discretion when it places limitations that effectively exclude the discovery of

facts that would constitute grounds for challenge for cause. Here, the court limited petitioner to 20 minutes and did not allow follow up questions about bias after denying the challenges.

In Rains v. Shcutte, 53 Ill. App. 2d 214, 202 N.E.2d 660 (5th Dist. 1964), the trial court improperly denied the plaintiff's motion to exclude the five policyholders or to permit examination of each on their voir dire. The court determined that the uncontradicted evidence that the company was a mutual insurance company, in which policyholders shared profits, had been sufficient to satisfy the requisite of good faith necessary to establish the right to examine the prospective jurors or to exclude them outright.

State Farm Mutual Automobile Insurance Company is no stranger to this issue of per se challenged jurors who are policyholders in a mutual insurance company and knew full well from prior court rulings that such jurors are excluded. See, e.g., Hill on behalf of Hill v. Lamulle, 506 So. 2d 690, (La. App. 5th Cir. 1987), where the court concluded that policyholders of mutual insurance companies are disqualified from serving as jurors in cases in which the insurer has a financial interest. The court determined that this is true

where it has been established that the company issuing the juror's policy was in fact a mutual insurance company. There the trial court had questioned the jurors as to whether any were insured by "State Farm" but failed to ascertain whether the policies of those who answered in the affirmative were insured by State Farm Mutual Automobile Insurance Company, a defendant in the case at bar, or State Farm Fire and Casualty Company, a stock company not involved in the case. Relying on Roques v. State Farm Ins. Co., 469 So. 2d 254 (La. 1985), which involved a similar issue concerning the same insurance companies, except that the stock insurance company had been the defendant, the court concluded that a challenge per se does not lie against a policyholder of a defendant insurance company, at least where the defendant is a stock company, but does lie against a mutual insurance company. In the instant case, the court itself inquired among the jurors regarding State Farm *Mutual* Automobile Insurance Company specifically, the named defendant in the case and the jurors identified themselves. See Appendix A at i. State Farm knows full well of these rulings specifically concerning its mutual insurance company and failed to disclose these rulings to the trial court here (nondisclosure by defendant's counsel definitely stating whether an insured involved in a case was a mutual company

is sufficient ground alone for plaintiff's counsel to strike the juror for cause, Bradshaw v. Byrd, 235 Ga. App. 25, 508 S.E.2d 433 (1998)) and the remedy should not only be a new trial, but State Farm should pay all of the Petitioner's attorneys fees and costs incurred in this matter from the date of voir dire forward.

FLORA ALLISON'S DUE PROCESS AND EQUAL PROTECTION RIGHTS AS A SEPARATE PARTY AND SEPARATE INSURED WERE VIOLATED BECAUSE THE JURY AND JUDGE DID NOT FIND AS TO HER ANY UNCLEAN HANDS THROUGH MISREPRESENTATION AND SHE SHOULD HAVE BEEN AWARDED ATTORNEY FEES AND COSTS.

On remand on attorneys fees, the district court erroneously failed to rule on an award of attorneys fees for Mrs. Allison as the prevailing party awarded coverage, despite Mrs. Allison being a separately named plaintiff, having a separate insured interests, being an innocent co-insured, having participated in her own pleadings, her own deposition by State Farm, testifying at trial, and incurring substantial attorneys fees throughout this long matter. State Farm admitted in its trial exhibit letter of its legal counsel (Trial exhibit 16 at sf0086, State Farm attorney Mannheimer)

that Mrs. Allison had a separate insurance interest, had to be compensated and that State Farm would run the risk of fees to her under Olympic Steamship Co. Inc. v. Centennial Ins. Co, 117 Wn.2d 37, 811 P.2d 673(1991) (an insured who prevails in suing his own insurance company for insurance is entitled to attorneys fees and costs in equity).

Like any separate party, Mrs. Allison has claims as an individual and the court simply overlooked her as a party. State Farm did not make any arguments about her individually in its pleadings or in the short ten minutes per side oral argument at the motion hearing on attorneys fees and the court asked no questions about her, as the major focus of all the pleadings and oral argument was the voluminous records regarding attorneys fees and reasonableness of the billings and the "lode star method" under Olympic Steamship, supra. When the court failed to address Mrs. Allison's fees in its month-later written order (the court made no ruling that day, so the parties could not catch this error), which failed to make any findings of fact or conclusions of law, as to her (See Appendix D) as required under Olympic Steamship, supra, this issue was raised immediately and extensively briefed by both parties in the appeal to superior court, citing several pleadings where Mrs. Allison claimed a separate interest as an innocent co-insured

who prevailed and was entitled to attorneys fees. The superior court admitted at the oral argument that she had not reviewed that thousands of pages of electronic records of all the pleadings in the lower court and in the earlier appeals, all of which were requested by the Allison for the appeal to the superior court and made a preliminary ruling on August 20, 2004 that no error regarding Mrs. Allison's fees had ever been raised before the district court ruling. After an extensive motion for reconsideration showing otherwise, the superior court denied the consideration without any findings of fact or conclusions of law.

The lower court made absolutely no findings to support denial of fees to Mrs. Allison. The jury made no findings at all regarding Mrs. Allison and anything bordering on misrepresentation or unclean hands. State Farm has never argued anything at all like this regarding Mrs. Allison throughout the thousands of pages of its pleadings, its trial testimony, exhibits, etc. In fact, as shown in the trial exhibits quotes Motion to Modify, State Farm actually took the opposite position stating that Mrs. Allison was entitled to attorney fees under Olympic Steamship as an innocent co-owner of the car here, as she had nothing to do with the accident and State Farm never formally denied her claim but instead kept her claim open.

A growing body of case law now recognizes that co-insured have rights independent of each other and that a policy violation by one insured may not void the policy as to the other. As State Farm here knows well, one court summarized:

> The minority view, previously the majority view, denies an innocent spouse recovery either because the underlying property ownership is an indivisible tenancy by the entirety, or because the wrongdoing of one spouse is imputed to the other under a theory of oneness of the married couple. The present majority view allows an innocent or divorced spouse to recover even though the co-insured spouse is at fault. The majority view courts reason that policy language excluding coverage must be explicit or that what is in question is the spouse's interest in the insurance policy, not the interest in the real property, or that the fault of the wrongdoing spouse cannot be imputed to the innocent spouse.

See, Commercial Union Ins. Co. v. State Farm Fire & Cas. Co., 546 F. Supp. 543, 546 (D. Colo. 1982). Many modern cases favor innocent co-insureds. Courts have protected them by saying that their rights and obligations under the policy are severable.

It is important to note that the instant case is not about whether Flora Allison should be denied coverage under a policy due to any alleged bad acts or omissions of her husband. There is no question that the jury awarded them

both coverage. This issue about whether or not Flora Allison should be awarded attorneys fees and costs under equity for prevailing against her insurance company does not turn upon any issue about whether she is to be covered under the policy or not, but only turns upon whether or not she herself is entitled to equity and has "clean hands". The lower court did not examine her separate case on this and did not make any findings about her equitable remedy and therefore she was denied due process and equal protection under the United States Constitution. See above at 4.

It is very important for this court to know that the biased jury selected here affected the attorneys fees issues for James Allison and Flora Allison because the lower court on remand determining attorneys fees and costs found that this particular jury awarded the Allisons damages for their insurance company's breach of contract but also impliedly, according to the trial court, thought that Mr. Allison was misrepresenting to his insurance company the facts of the two additional contacts between the cars that night because they did not compensate for those contacts. The jury never made any specific findings about those other contacts and certainly never found misrepresentation, but the judge found based on this biased jury's limitation of damages that this bias jury would also say Mr. Allison misrepresented. Both Mr.

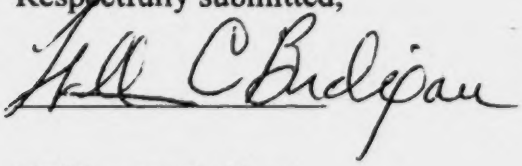
Allison and Mrs. Allison's due process rights were violated because the jury did not find unclean hands through misrepresentation by either of them and they both should have been awarded attorney fees and costs based on their separate claims. The biased jury tainted all decisions of the court based on anything from the biased jury.

The remedy here should be at least that Respondent pay all reasonable attorneys fees and costs incurred by Flora Allison in this matter through a hearing to determine reasonable attorneys fees under equity or alternatively, and only secondarily on this issue, new trial.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,



William C. Budigan

Date: November 2, 2005

Seattle District Court of the State of Washington in and for the County of King Transcript of Voir Dire Trial Proceedings Motions and Rulings June 25,2001

Page 10 Line 16 through Page 11 Line 15

THE COURT: Okay. The defendant in this case is State Farm Mutual Automobile Insurance Company, do any of you or are any of you knowledgeable about this insurance company? Okay. That would be-let me get my list out-Juror No. 5, Juror No.6, and 11, 12,13. 5,6,11, 12, 13. Okay.

THE JUROR: Can I ask a question of clarification?

THE COURT: Sure.

THE JUROR: Does it depend on what degree?

THE COURT: No. If you just know.

THE JUROR: Just know?

THE COURT: Umm-hmm.

THE JUROR: Like experience or just know about it?

THE COURT: Umm-hmm. No.1, No.2 – okay. Let me do it this way, who has not heard of State Farm Insurance? Would that be a better way of putting this question?

THE JUROR: Yes.

THE COURT: State Farm Mutual Automobile Insurance Company? No hands. Okay. You've all heard of them. Okay?

Page 20 Line 2 through Line 24

THE COURT: No. Okay. What I'm going to do now is allow Mr. Budigan some time to ask the jurors questions, and, again, he will probably call your name or call you by your juror number and ask you questions. These questions aren't meant to embarrass anyone, and we just want to get the best jury that we can get here in this case today; and so your fair and candid answers to the questions would be appropriate at this time. So, Mr. Budigan?

MR. BUDIGAN: Your Honor, I understand 20 minutes?

THE COURT: 20 minutes, yes.

MR. BUDIGAN: Thank-you, your Honor. These questions were asked of you and several answered certain ways and I have the numbers so I'm going to try to go through some of the more obvious ones of those. It isn't easy 20 minutes to inquire about all this and I have other questions with me on this. So I'll try to be brief.

Page 23 Line 3 through Page 24 Line 5

MR.BUDIGAN: And let's,well, let me-let me just ask that of everyone, whether or not you have State Farm as an insurance company now, anyone? If you could-I'm not as adept as getting the numbers-maybe-if you folks-do you folks know your numbers?

THE COURT: Juror-Juror No.5-

MR. BUDIGAN: If you could-

THE COURT: -No.6 and No.11

THE JUROR: -11.

MR.BUDIGAN: Okay. And now, if I could ask, have any of you had State Farm as your insurance company for home, auto, life, or any insurance in the past?

THE COURT: No.15-

MR. BUDIGAN: And by that I mean other than currently right now?

THE JUROR: I should have raised my hand for that question, so-

MR. BUDIGAN: Your number, please?

THE COURT: Okay. No. 15, 14, 12, & 1.

MR. BUDIGAN: One, you're current, though. You're in the first group.But in the second group it's 15, 14, and 12 had State Farm in the past.

Page 80 Line 7 through Line 12

THE COURT: Okay. Again, potential jurors, you can talk amongst yourselves. I'm going to ask the counsel to come up here. What we are going to do is we are going to talk private amongst ourselves about which jurors are going to be selected for the juror-jury.

Page 81 Line 3 through Line 10

THE COURT: So why don't you just take time to speak amongst yourselves. And, Counsel, if you could come forward. Com over here, that would be great. (Jury selection held at sidebar.) What I want to do first, now, is call the juror numbers that have been selected……

Page 84 Line 11 Through Page 86 Line 20

MR. BUDIGAN: Your Honor, I just want to put on the record that I have- I had asked for cause be removed Jurors 1,

5, 6 and 11, which all ultimately became jurors in this case because they are State Farm Policyholders now. And I, at the time, motioned and said these people who are- people who are in contract with the defendant insurance company in this case and the Court ruled against me; and I just want to make record to that and I object to that. Like-

THE COURT: Actually you- you asked for Jurors No. 4, 5, and 6 on those grounds, according to my notes. And I think that-

MR. BUDIGAN: No, your Honor, I-I knew from the question and from my list that I have here that I asked for 5, 6, 1, and 11. And I apologize that there's some communication with this, but I was shocked that this list of people who are insureds are going to be put on the jury.

THE COURT: Okay. Notwithstanding your shock, I think that there were no other grounds other than them having-having a contract with the defendant to provide insurance, there were no other grounds of bias or anything else that you could point to other than they had a contract. And so that's why I did not grant your motion for cause. I do have it noted down here 4, 5, and 6 though: and that's-that's what I believe you said at the time. I don't have anything

written by No. 1, and I don't have anything written by No. 11. It-it may or may not matter as to which juror numbers they were-or they are, but that's what my notes reflect of that moment.

MR.BUDIGAN: Yeah, your Honor, the-I-at the time of the objection I mentioned that there was a limited time for asking questions and that –that when we-when we-that there wasn't much time to find out whether-here's what I objected to. I said that these people have an economic interest because it's possible they would think that with a decision against State Farm, possible, here, their insurance rates could go up and being current policyholders, that could affect them. I-I-and I- we are under a very limited time frame to do all this, and I had to lead off and ask a lot of the basic questions before we found out that answer fully who-who was currently insured. But I –I still feel that that-those should have been-those people should have been removed. They have a contract-

THE COURT: Okay. I understand your objection and it's so noted.

MR. BUDIGAN: Thank-you, your Honor.

Seattle District Court of the State of Washington in and for the County of King Transcript of Trial Proceedings Motions and Rulings June 26,2001

Page 24 Line 12 through page 36 Line 3

MR. BUDIGAN: I'm sure he's The next question is the juror issue. Your Honor, there were four out of the six jurors chosen are current State Farm policyholders for auto insurance.

MR. ROGERS: Your Honor, I'm going to object here. This has been argued and you've ruled.

MR. BUDIGAN: No.

MR.ROGERS: It's wasting the time of the Court.

MR. BUDIGAN: Your Honor, I have found the case on it, I've researched it. This only happened at 4:15, 4:30 yesterday, and you did rule. You did rule, and I'm asking- I'm presenting a case that's on point to the Court and –and I'm asking the Court to re-reconsider this-

THE COURT: And what would your proposed-

MR. BUDIGAN: before we-before-

THE COURT: -remedy be?

MR. BUDIGAN: - we waste time on a jury for a whole week.

THE COURT: What would be your proposed remedy?

MR.BUDIGAN: One-well, that's what I needed to ask the Court and the Court staff is, first of all, are there any holdover jurors, by any chance, that are still from any other courtrooms from Monday available.

THE COURT: No. Regardless of whatever we have, I'm sure there's always jurors some place in this building. So, what would your proposed remedy be? Because that's – that's as important as making a ruling on this because if you have a remedy, that's just, you know, not even within the realm of possibilities today, you know-

MR.BUDIGAN: I think that-

THE COURT: -I'm not willing to entertain long discussion about this.

MR.BUDIGAN: I think the proposed- proposed remedy is that we would dip into another pool of jurors and we would select a- a certain number of them that we think is sufficient to pick four more jurors and that we-we come to a conclusion of how many peremptory challenges each side is allowed for hopefully a smaller pool than the 16 that we started with. The majority of this jury is what it takes to –to make a decision here, and the majority of this jury are State Farm policyholders and if I could-

THE COURT: Would you have felt any different if they were unhappy State Farm policyholders? Would you be making the same argument if they had all said, You know, State Farm, I had a horrible time with them and – and I really don't like them, would you be making the same argument?

MR. BUDIGAN: One, I wouldn't be making that argument because they would have stricken for cause. If someone said-you Honor, if I could-if someone said to all of us while we were asking questions, I don't like State Farm and I'm one now, I would expect that that person by-by-for cause, the Court would say, I'm not going to put on this jury a State Farm policyholder that hates State Farm. It's a bad faith claim against State Farm. That I couldn't expect that that

juror would stay on. Now, you know, the only thing I could think was maybe by some freak chance of so many worse people being in the bigger pool and all the challenges and all the-all the strikes, the peremptory strikes gone, all those gone, maybe somebody like that would get on. But I –I-my point is I don't believe anyone who is a State Farm insured, good or bad and how they like State Farm or not, no one should be in a case deciding whether State Farm should pay money here. And- and this point-this case that's on point is-

THE COURT: You've shared this case with opposing counsel?

MR.BUDIGAN: Yes, I will, your Honor.

THE COURT: Have you before now?

MR. ROGERS: No.

MR. BUDIGAN: No. And we just got here..

MR. BUDIGAN: I didn't have this case yesterday.

THE COURT: Okay. It seems to me that this is something that could have been taken care of in a motion in limine.

MR. BUDIGAN: Your Honor, it's-it's-

THE COURT: What I'm going to do

MR. BUDIGAN: -shocking and amazing to me that there would even be a suggestion that a State Farm person-that would even need be a ruling that a State Farm policyholder would be put on this jury. Now if I could direct the Court's attention-what-if I could-what happened on this case, very briefly, is that the malpractice suit against Group Health – Group Health Medial- the hospital, Group Health, and there were several Group Health health insurance insureds in the jury pool. They ended up getting on the jury. When the plaintiff didn't like the result of the whole trial, at the end of it he appealed. And part of his appealing was, Hey, they let on some Group Health insureds rule on Group Health, medical liability, here. The court ruled, if you- if you'd look at-down on-on-it's-it's page 5 of 9, and it's hard to read, it's on the top, your Honor. Right-hand top, it says 5 of 9? At paragraph bracketed 34, "We hold that the trial court's decision to deny appellant's Motion for New Trial on the basis of error in jury selection was based on tenable grounds." The record before us indicates that none of the jurors affiliated with Group Health cooperative paid his or her own premium," remember this is health insurance and they-it was either because they were-they were a group that-

and employment group or something like that, they didn't have to pay their own out of their pocket. "Thus none held a direct pecuniary interest in Group Health cooperative, so they were sufficiently interested to qualify as impliedly biased within the scope." So the first thing they look to was whether or not someone paid their premiums. And, your Honor, it is true we have not asked these members if they paid their own premiums, but I –in real life, and I ask the judge to take judicial notice of this, very few employers ever pay someone's automobile insurance. They wouldn't pay someone's Farmer's automobile insurance. Sometimes a car that you're driving for work, maybe, but-but these people are saying, they, themselves, are insureds of State Farm. Worse yet, your Honor, State Farm is a mutual insurance company, as I understand it. And I don't know a lot about this, but my understanding is they get dividends and rebates, some sort of monies back from what the company makes because it's a mutual company versus a straight-up, for-profit company. And I understand that they actually get some pecuniary monies back. So, (1) I think that they do make their premiums, and (2) I think they get money back from –from State Farm. I don't know as a fact, we haven't had testimony from State Farm personnel; but I'm sure to ask that question in this case. The next-the next question is why they ruled

against this fellow, this attorney who did this? Is he left one of his peremptory challenges sitting on the table when he said I'm done, I accept these people. And the other thing is he didn't stand up and say, These people should be removed for cause, he didn't object to these people. What he argued is that he impliedly objected to them, and the record was insufficient. And the court found that, "The appellant failed to present: -this is in brackets, paragraph 45 on page 7 of 9-" the appellant failed to present specific challenges for cause to the jurors now challenged. "Additionally, the record before this court indicates that none of the jurors on the panel affiliated with Group Health held a direct pecuniary interest; furthermore, the appellant waived any error by failing to exhaust his peremptory challenges. I exhausted my peremptory challenges, I did object to State Farm policyholders, but-but-and I believe they have pecuniary interest. But more importantly, your Honor, is I believe-I don't believe, my notes reflect, and I believe that the record in this case will actually reflect-that juror numbered-jurors numbered 6 and 11 stated that they may be impartial. And when asked why, it's because they said that they have State Farm as their insurance company. The question was asked-

THE COURT: They said that?

MR. BUDIGAN: Yes.

MR. ROGERS: No.

MR.BUDIGAN: The-the question was asked, Which one may be impartial? 3,8,6, and 11 said it. Three said she worked for the torts Seattle Law Department, not because she's impartial-

THE COURT: Well, 3, 8-3 is off the jury.

MR. BUDIGAN: Yes, your Honor.

THE COURT: Okay.

MR. BUDIGAN: But I'm going back to our notes. The question was asked: do you believe that there's any basis of why you might be impartial in this case? Three said, Yeah, I work for the Seattle law department, the torts-I handle the torts, and I do defend the City in auto accidents. Eight said-eight said I have State Farm and I can't be impartial. Six said, I have State Farm. 11 said I may also be impartial-may-may not be impartial.

THE COURT: No. 8 is not a State Farm policyholder.

MR. BUDIGAN: No. No. 8 is Mr. Young, and he said, I've read about it and I'm-I'm concerned

THE COURT: Yeah. But he's-he's'

MR. BUDIGAN: He said I –

THE COURT: -he's not a State Farm policyholder.

MR. BUDIGAN: I-this is-this is

MR. ROGERS: Your Honor, No.8 was stricken, too.

MR. BUDIGAN: - this is the list of the people who said, in answering the question do you think you might not be impartial here? And these are the people who said it. And my point is-

THE COURT: But you're talking about –your argument that you're spending time on , Mr. Budigan, is you're talking about jurors who are not on the juror panel.

MR. BUDIGAN: But 5 and 11 are, and they said that I may be impartial. And when asked about it-I asked about 5, asked-he said he had an auto claim through State Farm and he's a current State Farm policyholder. 11, I-I don't have notes on 11 what-what 11 specifically said about why 11

might have a –might have an impartiality problem. But 11 said I'm State Farm policyholder. The problem with this whole thing, your Honor, it really is this: we had 20 minutes- I had 20 minutes and I had the lead off of all the questions that you asked that-

THE COURT: Mr.Budigan, that's a court-let me-that's-that is not a situation that is uncommon okay? Everybody has a certain amount of time. You-you get to pick the questions that you ask in voir dire, okay? You had 30 minutes and then you had 10 minutes, and it was your choice on the questions that you wanted to ask. You know, that's not-that can't be part of this juror selection argument.

MR. BUDIGAN: Your Honor, my point is that I did not spend a great deal of time because (1) they said they were State Farm and (2) they said they're impartial so I had limited time. I didn't spend time on them because in my opinion there's no question that a State Farm insured, current insured, should not be on this jury when the issue is whether or not State Farm should pay in this case. And so I did not spend a great deal of time on it.

THE COURT: What's the status of this case? Is it-is it still good law?

MR. BUDIGAN: Yes, I've Shepardized it.

THE COURT: You've Shepardized it and you've checked it?

MR. BUDIGAN: It's good law, your Honor.

THE COURT: Okay. I'm going to give you 10 minutes to go ahead and read through this case, Counsel, if you need to.

MR. ROGERS: I've read it.

Page 38 Lines 14 through 18

THE COURT: I'm going to –can you-can one of you pull 632 Wn. App. for me- or 62 Wn. App., I'm sorry. And I'm going to take a couple of minutes and just read through the case and –

Page 40 Lines 1 through 10

THE COURT: Mr. Budigan, would you tell me exactly, which jurors you're talking about? No, please sit down.

THE COURT: Thanks. I'm sorry.

MR. BUDIGAN: Your Honor, Jurors Number-and these are the original number, not the seat number-original No. 5,6,11,

and 1 said they had State Farm Currently; 15,14, and 12 said that they in the past had State Farm.

Page 41 Line 22 through Page 45 Line 9

THE COURT: Okay. I understand the-your argument, Mr. Budigan. Your motion is denied and it's not denied for these grounds. I've had an opportunity to read Dean v. Group Health Cooperative. Even in that case there appeals-the court of appeals found that the-the judge had not made an error by not removing people who had a connection with Group Health Cooperative who were also jurors. And I am mindful of the test on footnote 4 that says that, "if a juror holds a direct pecuniary interest in Group Health Cooperative, they might qualify as impliedly biased within the scope of RCW 4.44.189 subpart 4." But I also am drawn to headnote 3 in the case that says, A party accepting a juror without exercising its available challenges cannot later challenge that juror's inclusion. And I do recall that you did object to Juror No. 5 and Juror No. 6 on these grounds, yet you did not use any of your challenges to remove the particular jurors. And I think that rather than raising the argument about these jurors, both after jury selection and this morning, you do not include in your discussion the fact that- any reasons why you didn't

use any challenges, your existing challenges, to remove any of these jurors. It is a close one, I understand that, but we're going to go ahead and go forward today with the jury that has been seated.

MR. BUDIGAN: Your Honor, may I just something on the record, very brief? I just want to say-

THE COURT: You've already put a lot on the record on this.

MR. BUDIGAN: I didn't-I would like to say one short statement for the record, and that is I asked for these for cause before my peremptory challenges. And I was shocked that the Court ruled that way, and I used that term-

THE COURT: Yes, Mr Budigan, you've told me, again, how shocked you are by this ruling. Let-I'm going to interrupt you because this is-we're walking over ground that we walked over yesterday, this morning, and –and now again. Yesterday you said jurors No.4, 5, and 6. Today it's No. 1, 5, 6, and 11. You know, it's a moving target, okay? So I'm talking about No. 5 and 6, I accept those as the same ones that we talked about yesterday. And you did not exercise peremptory challenges after you challenged—as for challenges for cause on those particular jurors.

MR. BUDIGAN: Your Honor, the point I'm trying to make is I didn't have enough peremptory challenges to get rid of all of those four and others. There were- there were, like, seven- there were 1,2,3,4,5,6-there were seven. I couldn't get rid of all of those with three peremptory challenges and-and I had clearly worse biased people to deal with. And to –to have to offset worse versus State Farm employees and make a decision on that when the Court had already ruled and said I can't have-I cannot have them removed when they're State Farm, then it was out-my hands were tied is my point on that. And the other point is, your Honor, I'm sorry that this jury selection was off the record and done at sidebar; but we were definitely talking about State Farm current insureds, and I understand the Court has a difference of opinion that I do, that both my sets of notes that said the numbers that I believe I said of –of these numbers 5, 6,11, and 1. But-but I understand that the Court says I said a different set of numbers, but we all were talking about State Farm current policyholders, regardless of their number. And I-I understand the Court's ruling and we're ready to proceed.
THE COURT: Okay. Thank-you.

SUPERIOR COURT OF THE STATE OF WASHINGTON

COUNTY OF KING

JAMES ALLISON, et ux.	)
Plaintiff-Appellant	)NO.01-2-25363-8SEA
vs.	) DECISION ON RALJ
STATE FARM MUTUAL	) APPEAL
AUTOMOBILE INS. CO.	) CLERK'S ACTION
Defendant-Respondent	)REQUIRED

This appeal came on regularly for oral argument on July 11, 2002 pursuant to RALJ 8.3, before the undersigned Judge of the above entitled court and after reviewing the record on appeal and considering the written and oral argument of the parties, the court holds the following:

(1) The decision of the District Court is affirmed in all respects.

(2) The court determines that Olympic Steamship fees in the District Court have not been waived. This cause is REMANDED to the District Court solely for determination of entitlement to Olympic Steamship fees incurred in District Court, and the amount, if any, to be awarded.

IT IS HEREBY ORDERED that the above cause is:

[x] AFFIRMED; [ ] REVERSED; [ ] MODIFIED;

COSTS_____

REMANDED to King County District Court for further proceedings, in accordance with the above decisions and that the Superior Court Clerk is directed to release any bonds to the Lower Court after assessing statutory Clerk's fees and costs.

Dated July 11, 2002

"s/ Michael J. Trickey"
Judge Michael J. Trickey

"s/William C. Budigan" WSBA#13443
Counsel for Appellant

"s/ Michael Rogers" WSBA#16423
Counsel for Respondent

IN THE KING COUNTY DISTRICT COURT,
WEST DIVISION
STATE OF WASHINGTON

JAMES E. ALLISON and FLORA ALLISON,	) NO. 98-4221
Plaintiffs,	) MEMORANDUM
vs.	) OPINION RE:
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,	) ATTORNEY FEES
Defendant.	)

THIS MATTER came on for hearing before the undersigned judge of the above-entitled Court on February 2, 2004. Plaintiffs were represented by William C. Budigan. Defendant was represented by Michael S. Rogers. The Court, having considered the oral arguments presented by counsel on February 2, 2004, as well as the trial record, including testimony, evidence, and records herein, Plaintiff's Motion for Attorneys Fees, Expert Fees and Costs, and Defendant's Opposition to Plaintiff's Motion for Attorney's Fees and Costs, and the Decision of the King Court Superior

Court on RALJ Appeal dated July 11, 2002, now makes and enters the following:

PROCEDURAL CASE HISTORY

Trial of this case in District Court was held on June 25, 2001, and concluded on July 6, 2001. They jury determined that Defendant did not fail to act in good faith and that Defendant did not engage in an unfair or deceptive act or practice. With respect to the breach of contract claim, however, the jury determined that there was an accident and wrote the following on the Special Verdict Form: "We found the 1st impact to be the only accident." Damages were awarded by the jury in the amount of $1,404.00. On August 2, 2001, this Court entered judgment in this amount, plus statutory attorney fees of $125.00. Plaintiffs filed their notice of appeal to the King County Superior Court on August 31, 2001 concurrently with a Motion for Attorney's Fees and Costs with this Court. On October 1, 2001, this Court denied Plaintiffs' Motion for Attorney's Fees and Costs due to the pending appeal.

The King County Superior Court's Decision of RALJ Appeal was entered on July 18, 2002, which affirmed the District Court's decision in all respects and remanded to the District Court "solely for determination of entitlement to Olympic Steamship fees incurred in District Court, and the

amount, if any, to be awarded." On August 26, 2002, the King County Superior Court denied Plaintiff's Attorney Fees and Costs on appeal, ruling that Plaintiffs were not the prevailing party on appeal. On August 16,2002, Plaintiffs filed a Notice of Appeal to the Court of Appeals, Division 1. On January 3, 2003, the Court of Appeals issued its "Commissioner's Ruling Denying Motion for Discretionary Review." A Petition for Review by the Washington State Supreme Court was then filed by the Plaintiffs, which apparently was not timely filed as the state Supreme Court issued a Ruling Denying Extension.

On December 3, 2003, the King County Superior Court remanded the case to this Court to consider the Plaintiffs' entitlement to attorney fees under Olympic Steamship. At the February 2, 2004 hearing on this matter, Plaintiffs presented argument of a "de facto contingency fee" entitlement to attorney fees, yet the fee agreement was for an hourly rate. Additionally, Plaintiff's oral argument on rebuttal failed to address Defendant's argument with respect to the exception to Olympic Steamship when misrepresentation is involved and equitable relief is being sought.

CONCLUSIONS OF LAW

Under the American Rule, attorney fees generally are not recoverable in the absence of a contract term or statute allowing for their recovery. In the insurance context, however, case law has established that an insured who is compelled to assume the burden of legal action to obtain the benefit of its insurance contract is entitled to attorney fees, whether or not the insurance policy contains a provision for such fees. Olympic Steamship Co. v. Centennial Insurance Co., 117 Wn.2d 37 (1991). The decision in Olympic Steamship for entitlement to attorney fees in the absence of contract term or statute is based on equity. McGreevy v. Oregon Mutual Ins. Co. 128 Wn.2d 26 (1995); Dayton v. Farmers Ins. Group, 124 Wn.2d 277 (1994).[1] The rationale of the Olympic Steamship case is that equity recognizes that an insurance company, because of its enhanced fiduciary obligation, owes a measure of relief to its insured when certain factors combine to frustrate an insured's justifiable expectation of insurance protection. As referenced in Olympic Steamship, those factors are (1) a disproportionate

[1]The equitable grounds on which an award of fees may be based are(1) bad faith conduc of the losing party (2) preservation of a common fund; (3) protection of constitutional principles:and (4) private Attorney General actions. *PUD 1 v.Kottsick*, 86 Wn.2d 388 (1976); See also, *Stevens v. Security Pac. Mortgage Corp.*, 53 Wn.App. 507(discussion

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bargaining position of an insurer vis-à-vis the typical insurance consumer; and (2) actions of the insurer that cause an insured to suffer the costs of litigation in order to compel an insurer to honor its commitment to provide coverage. See Olympic Steampship at 52-53 (citing Hayseeds, Inc. v. State Farm Fire & Casualty Co., 352 S.E.2d 73,77 (W. Va.1986). However, equitable relief can only be afforded under the principles expressed by the old equity maxims: "he who seeks equity must do equity", and "he who comes into equity must come with clean hands." Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc., 96 Wn.2d 939, at 949 (1982); Port of Walla Walla v. Sun-Glo Producers,Inc., 8 Wn.App. 51, at 56 (1972).

It is abundantly clear form the trial record in this case that Plaintiffs have come before this court requesting attorney fees and costs with "unclean hands." The material misrepresentations of facts and circumstances made by Plaintiffs to Defendant in connection with the insurance claim investigation of purported damage to Plaintiffs' vehicle violated the terms of the insurance contract, as well as the public policy of this state and were prejudicial to the Defendant. None of the factors set forth in the Olympic

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award of attorney fees under the doctrine of equitable indemnification), *review denied*, 1112 Wn.2d 1023 (1989).

Steamship case to form a basis for an award of attorney fees are present in this case. Plaintiffs' own acts preclude an award of attorney fees under the equitable grounds upon which the Olympic Steamship case is based.

The statutory attorney fees in the amount of $125 awarded to the Plaintiffs in this Court's August 2, 2001, judgment stands.

After reviewing Plaintiffs' cost affidavit, the court orders reasonable costs to be awarded to the Plaintiffs in the amount of $10 for service of process on the Defendant.

DATED this 18th day of February, 2004.

"s/ Eileen A. Kato"
Eileen A. Kato, Judge

SUPERIOR COURT OF THE STATE OF WASHINGTON

COUNTY OF KING

JAMES E. ALLISON and	)
FLORA ALLISON	)
Plaintiff-Appellant	) NO.04-2-06115-6SEA
vs.	) DECISION ON RALJ
STATE FARM MUTUAL	) APPEAL
AUTOMOBILE INS. CO.	) CLERK'S ACTION
Defendant-Respondent)	REQUIRED

This appeal came on regularly for oral argument on August 20,2004 pursuant to RALJ 8.3, before the undersigned Judge of the above entitled court and after reviewing the record on appeal and considering the written and oral argument of the parties, the court holds the following:

The court finds no error of law, and Judge Kato's finding of material misrepresentations is supported by substantial evidence. These material misrepresentations violated the contract and equity. The district court correctly denied the request for attorney's fees. The court finds no error regarding Mrs. Allison's fees because the issue was not raised before Judge Kato's ruling.

IT IS HEREBY ORDERED that the above cause is:

[x] AFFIRMED; [ ] REVERSED; [ ] MODIFIED;

COSTS are awarded to respondent State Farm.

Dated August 20,2004 "s/ Carol Schapira "
Judge

"s/William C. Budigan" WSBA#13443
Counsel for Appellant

"s/ Michael Rogers" WSBA#16423
Counsel for Respondent

THE SUPREME COURT OF WASHINGTON

JAMES E.ALLISON and FLORA	)
ALLISON,	)
Petitioners,	) NO.77069-7
	) RULING
	)DENYING
v.	) REVIEW
STATE FARM INSURANCE,	)
Respondent.	)

James and Flora Allison sued their automobile insurer, State Farm Mutual Insurance Company, for damage allegedly done to their van in an accident, and for bad faith and violation of the Consumer Protection Act. A King County District Court jury found that one of the several impacts in which the Allisons' van was involved qualified as an accident, and awarded damages of $1,404. In other respects the jury found for State Farm. The Allisons

appealed to the King County Superior Court, which generally affirmed but remanded for a district ruling whether the Allisons were entitled to attorney fees under *Olympic Steamship Company, Inc. v. Centennial Insurance Company,* 117 Wn.2d 37, 811 P.2d 673 (1991). The Court of Appeals denied the Allisons' motion for discretionary review, and this court denied their motion for an extension of time to seek further review. No.74134-4.

On remand, then, the district court determined that the Allisons did not qualify for an *Olympic Steamship* attorney fee award. The Allisons again appealed, but the superior court affirmed. The Court of Appeals again denied discretionary review. RAP 2.3(d). The Allisons now again seek review by this court.

The Allisons first contend that this request should be regarded as a petition for review under RAP 13.4 rather than a motion for discretionary review under RAP 13.5. But as I explained when the case was last here, a Court of Appeals decision is not a "decision terminating review" under RAP 12.3(a) just because there is no avenue for further review as a matter of right. The Court of Appeals decision was "interlocutory" under Rap 12.3(b). This request for review is thus a motion subject to RAP 13.5.

And having now thoroughly studied the parties' pleadings, and having heard oral argument, I can find no basis for review in light of the criteria of RAP 13.5(b). As did Court of Appeals Commissioner Craighead, I find that most of the Allisons' arguments were either rejected in the prior appeal or were waived. To the extent those claims might be considered again notwithstanding "law of the case" principles, I see no compelling reason to do so. As for the *Olympic Steamship* claims not made and rejected in the prior appeal, I simply am not persuaded that the Court of Appeals erred in concluding that review was not called for under RAP 2.3(d).

The motion for discretionary review is denied.

"s/Geoffrey Crooks"
COMMISSIONER

August 4, 2005

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION 1

JAMES ALLISON and FLORA ALLISON,	)
Petitioners,	)NO. 55115-9-I
v.	)CERTIFICATE
	)OF FINALITY
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,	) King County)Superior Court)No.04-2-06115-6.SEA
Respondent.	)

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and for King County.

This is to certify that the ruling of the Court of Appeals of the State of Washington, Division 1, filed on January 20,2005, became final on October 21,2005. An order denying a motion to modify was entered on April 12, 2005. A ruling denying a motion for discretionary review was entered in the Supreme Court on August 4, 2005.

c: William Budigan
Michael Rogers

IN TESTIMONY WHEREOF, I
Have hereunto set my hand.
And affixed the seal of Said Court
at Seattle, this 21st day of October,
2005.

"s/Richard D. Johnson"
Richard D. Johnson
Court Administrator/
Clerk of the Court of
Appeals, State of
Washington Division 1.

Supreme Court, U.S.
FILED
05-917 NOV 2 - 2005
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

JAMES E. ALLISON & FLORA ALLISON-PETITIONERS

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY-RESPONDENT

PETITIONER'S SUPPLEMENTAL APPENDIXES H AND I ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

PETITION FOR WRIT OF CERTIORARI

WILLIAM C. BUDIGAN
2601 42ND AVE W
SEATTLE, WA 98199-3011
(206) 284-5306

RPI Legal Printers, Seattle, Washington

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APPENDIX H

Court of Appeals of the State of Washington Division I,

Commissioner's Ruling Denying Discretionary Review,

January 20, 2005

APPENDIX I

Court of Appeals of the State of Washington Division I,

Order Denying Motion to Modify, April 12, 2005

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

JAMES E. ALLISON	)	
AND FLORA ALLISON	)	
Petitioners,	)	No. 55115-9-1
v.	)	COMMISSIONER'S
STATE FARM MUTUAL	)	RULING DENYING
AUTOMOBILE,	)	DISCRETIONARY
INSURANCE COMPANY,	)	REVIEW
Respondent.	)	

James E. Allison and Flora Allison seek discretionary review of the order on RALJ appeal affirming the denial of an award of Olympic Steamship[1] attorney fees. The RALJ court held that substantial evidence supported the district court's finding that the Allisons had made material misrepresentations to their insurer, State Farm Mutual Automobile Insurance Company, and that the denial of attorney fees was appropriate. The Allsions fail to demonstrate that discretionary review is warranted pursuant to RAP 2.3(d).

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[1] Olympic Steamship Company Inc. v. Centennial Ins. Co., 117 Wn.2d 37, 811 P. 2d 673 (1991).

FACTS

This case involves a December 1997 traffic accident in which James Allison struck a car occupied by Robert and Beverly Linkletter. The Linkletters' insurer sued the Allisons, and the Allisons sued their insurer, State Farm, as well as the Linkletters. Eventually the Allisons agreed to a judgment against them for the property damage and dismissed their claims against the Linkletters, but maintained the action against State Farm. The incident involves a series of collisions between the Allison vehicle and the Linkletter vehicle. State Farm took the position that James Allison assaulted the Linkletters with his car and denied coverage; they also contend that Allison made misrepresentations about how the accident took place when the company interviewed him shortly after the accident.

The Allisons' claims against State Farm went to trial in June 2001 in Seattle District Court. The jury determined that State Farm did not act in bad faith, or engage in an unfair or deceptive act or practice. However, the jury apparently found that a portion of the damage was caused by accident. They wrote: "We found the 1st impact to be the only accident." The jury awarded damages under the policy in the amount of $1,404. The district court entered a judgment for that amount, as well as statutory attorney fees of $125.

The Allsions appealed and in July 2002, the King County Superior Court affirmed the district court's decision on RALJ appeal "in all respects," but remanded the issue of Olympic Steamship attorney fees to the district court because it had apparently not been addressed. The Allisons sought discretionary review in this court, which was denied. Subsequently, a different district court judge denied the Allisons' request for attorney fees. The district court ruled

> It is abundantly clear from the trial record in this case that Plaintiffs' have come before this court requesting attorney fees and costs with "unclean hands." The material misrepresentation of facts and circumstances made by Plaintiffs' to Defendant in connection with the insurance claim investigation of purported damage to Plaintiffs' vehicle violated the terms of the insurance contract, as well as the public policy of this state and were prejudicial to Defendant.

Memorandum Opinion re: Attorney Fees (February 18, 2004) at 4. The district court denied the request for attorney fees. The Allisons appealed to the superior court, which affirmed the district court on RALJ appeal. This motion for discretionary review follows.

CRITERIA FOR DISCRETIONARY REVIEW

Discretionary review of a superior court decision entered in a proceeding to review a decision of a court of limited jurisdiction (RALJ) will be accepted only:

(1) If the decision of the superior court is in conflict with a decision of the Court of Appeals or the Supreme Court.

(2) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(3) If the decision involves as issue of public interest which should be determined by an appellate court: or

(4) If the superior court has so far departed from the accepted and usual course or judicial proceedings, or so far sanctioned such a departure by the court of limited jurisdiction, as to call for review by the appellate court.

RAP 2.3(d).

DECISION

The Allisons raise numerous issues in their motion for discretionary review, but the only issue properly before the court at this time is the denial of attorney fees. All of the other issues raised by the Allisons, including their challenge to the jury selection process, were litigated or could have been litigated in their first RALJ appeal and initial motion for discretionary review. These issues have either been decided or waived.

With respect to the denial of attorney fees, the Allisons argue that because the jury found that the first impact was accidental and therefore should have been covered, they are entitled to attorney fees pursuant to Olympic Steamship. They also argue that Flora Allison, who was not involved in the collision, is an innocent spouse entitled to have her attorney fees paid even if her husband is not. The Allisons claim that she should not be forced to share in the community debt of $150,000 in attorney fees since she had nothing to do with the collision or the alleged misrepresentations. This argument was apparently not raised in the district court and the RALJ court therefore considered it waived. I agree with the RALJ court that this issue is waived. State Farm's brief in opposition to the award of attorney fees filed in district court makes all the arguments for denying attorney fees, including the fact that Allison made misrepresentations to State Farm in violation of the insurance contract's cooperation clause. The Allisons had the opportunity to respond to this argument with the claim that Flora Allison was an innocent spouse. They apparently chose not to do so, even in the face of an enormous legal bill. Neither the RALJ court nor this court need address an issue such as this that was never raised in the trial court.

The Allisons rely on Olympic Steamship holding that "an award of fees is required in any legal action where the insurer compel the insured to assume the burden of legal action, to obtain the full benefit of this insurance contract, regardless of whether the insurer's duty to defend is at issue." Olympic Steamship, 117 Wn.2d at 53. But Olympic Steamship does not require an award of attorney fees when an insured has failed to comply with the terms of coverage. PUD No. 1 of Klickitat County v. International Ins. Co., 124 Wn.2d 789, 815, 881 P.2d 020 (1994).

State Farm notes that the Allisons' insurance policy does not provide coverage if anyone insured under the policy makes false statements or misrepresentations in connection with a claim, and requires the insured to provide facts about any accident to the company. State Farm contends that the Allisons' failed to comply with these terms of coverage. Moreover, State Farm argues that the Olympic Steamship rule sounds in equity and a party who seeks equitable relief must not come into court with "unclean hands." Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc., 96 Wn.2d 939, 949, 640 P.2d 1051 (1982); Port of Walla Walla v. Sun-Glo Producers, Inc., 8 Wn. App. 51, 56, 504 P.2d 324 (1972).

The district court made a very clear finding after having reviewed the record (which is not before me) that the Allisons acted with unclean hands. The jury's comment that it found only the first impact to be accidental, which was interlineated on a special verdict form, demonstrates that it considered the other collisions not to have been accidental. This suggests that the jury also thought that James Allison had made misrepresentations about how the collisions unfolded. The Allisons have not demonstrated that the RALJ court's affirmance of the district court's decision conflicts with an appellate court decision. None of the other criteria set forth under RAP 2.3(d) apply. Discretionary review is denied.

State Farm seeks an award of attorney fees for the filing of a frivolous motion for discretionary review. RAP 18.9(a) speaks only to an award of attorney fees as a sanction for filing a frivolous appeal. Because this is not an appeal, the request for an award of attorney fees is denied.

Now, therefore, it is hereby ORDERED that discretionary review is denied. It is further ORDERED that State Farm's request for attorney fees is denied.Done this 20th day of January, 2005.

"s/Susan Craighead"

Court Commissioner

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

JAMES E. ALLISON AND FLORA ALLISON	)	
Petitioners	)	No. 55115-9-1
v.	)	ORDER DENYING MOTION TO MODIFY
STATE FARM MUTUAL AUTOMOBILE, INSURANCE COMPANY,	)	
Respondent.	)	

James and Flora Allison have moved to modify the commissioner's January 20, 2005 ruling denying discretionary review. We have considered the motion under RAP 17.7 and have determined that it should be denied.

Now, therefore, it is hereby

ORDERED that the motion to modify is denied.

Done this 12th day of April, 2005.

"s/Coleman, J"

"s/Cox, CJ" "s/Kennedy, J"